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FILED
APR 22 1994
OFFICE OF THE CLERK

Nos. 93-762 and 93-1094

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC., *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY, *Respondent.*

CITY OF CHICAGO, *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER JEROME B. GRUBART, INC.

BEN BARNOW
Counsel of Record
ALAN M. GOLDBERG
ALBERT CUELLER
BARNOW AND HEFTY, P.C.
105 W. Madison St., Ste. 2200
Chicago, Illinois 60602
(312) 621-2000

ROBERT A. HOLSTEIN
BRUCE J. GOODHART
ARON D. ROBINSON
HOLSTEIN, MACK & KLEIN
300 S. Wacker Dr., 32nd Fl.
Chicago, Illinois 60606
(312) 906-8000

WILLIAM J. HARTE
WILLIAM J. HARTE, LTD.
111 W. Washington Street
Suite 1100
Chicago, Illinois 60602
(312) 726-5015

PHILIP B. KURLAND
ALAN S. MADANS
ROTHSCHILD, BARRY & MYERS
55 W. Monroe Street
Suite 3900
Chicago, Illinois 60603
(312) 372-2345

Counsel for the Petitioner Jerome B. Grubart, Inc.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTIONS PRESENTED

Whether the Seventh Circuit erred in holding, in conflict with other courts of appeals, that *Sisson v. Ruby*, 497 U.S. 358 (1990), forecloses consideration of the totality of the circumstances in the admiralty jurisdiction inquiry, and thereby extends admiralty law to situations where the injured parties and the instrumentalities have no maritime connections or attributes?

Does not the nexus prong of the *Sisson* test contemplate that the "activity" necessarily be defined differently from the "incident"?

LIST OF PARTIES

The Petitioner is Jerome B. Grubart, Inc.,* a claimant in the limitation proceeding. The City of Chicago, a defendant in the proceedings below, filed a separate petition for writ of certiorari (No. 93-1094) which was granted and consolidated with this matter. The Respondent is Great Lakes Dredge & Dock Company.

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* Pursuant to Supreme Court Rule 29.1, Petitioner Grubart states that it is a wholly owned subsidiary of Steven T. Grubart, Inc.

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BRIEF FOR THE PETITIONER JEROME B. GRUBART, INC.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 3 F.3d 225 (7th Cir. 1993), and is reprinted in Petitioner Grubart's Appendix to its Petition for Certiorari at Pet. App. 1. The order of the Court of Appeals for the Seventh Circuit denying Grubart's petition for rehearing with suggestion for rehearing *en banc*, and amending the Seventh Circuit opinion, is reprinted at Pet. App. 17. The memorandum opinion of the United States District Court for the Northern District of Illinois, Eastern Division (Judge Kocoras) has not been reported. It is reprinted at Pet. App. 22.

JURISDICTION

Respondent brought this action in the United States District Court for the Northern District of Illinois invoking federal admiralty jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740, and seeking exoneration from or limitation of any liability it might incur from various state and federal common law actions. On February 18, 1993, the district court dismissed Respondent's complaint both for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

On Respondent's appeal, the Seventh Circuit reversed the district court's order on August 24, 1993, and remanded the matter for further proceedings. By order dated October 7, 1993, the Seventh Circuit denied Grubart's petition for rehearing and amended its opinion of August 24th. (Pet. App. 17-19).

On Grubart's motion, the Seventh Circuit stayed the mandate pending the filing of a petition for certiorari. (Pet. App. 20). The mandate has been stayed pursuant to Federal Rule of Appellate Procedure 41(b) until final disposition by this Court.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1). On February 22, 1994, this Court granted certiorari and consolidated it with the City of Chicago's petition (No. 93-1094).

STATUTES INVOLVED

28 U.S.C. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 740

§ 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act [46 App. U.S.C. 781 et seq.] or Suits in Admiralty Act [46 U.S.C. 741 et seq.], as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

STATEMENT OF THE CASE

Thousands of plaintiffs, including Petitioner, Jerome B. Grubart, Inc., were included in the scope of the "Chicago Flood" class-action lawsuit against Respondent, Great Lakes Dredge & Dock Company ("Great Lakes"), in the Illinois state court. The class action complaint (Record at 44, Tab A) alleges that Great Lakes, while under contract to the City of Chicago ("City"), negligently removed and replaced pile clusters in the Chicago River juxtaposed to a bridge on Kinzie Street in Chicago. The contract was entitled "Various Drawbridges New Pile Clusters" (J.A. 16) and Great Lakes performed the work near a number of bridges during the summer and fall of 1991. The pile driving work was performed using a tractor-crane sitting atop a stationary barge in the river. (*See* photos at J.A. 64-68).

Great Lakes' activities, along with the City's failure to repair, led to the rupture of an extensive underground freight tunnel system ("the tunnel") owned by the City and located under the riverbed at the Kinzie Street bridge. The tunnel traverses the downtown business district of Chicago, popularly known as the Loop, and directly connects to a number of Loop buildings. On April 13, 1992, over six months after Great Lakes completed its work, river water cascaded into the tunnel at the Kinzie Street work site and inundated the basements of numerous downtown buildings, including the two locations of Grubart. Grubart's two locations are typical of those of the class action plaintiffs in that they are located in the Loop, which is generally said to begin approximately six blocks from the area of the tunnel breach.

After considering a number of repair options, the City obtained the assistance of the U.S. Army Corps of Engineers to drain and repair the tunnel. To facilitate that

repair work, the river in the general area of the breach was closed to river traffic not related to tunnel repair.

On October 6, 1992, a few days before the period for filing an admiralty claim was to expire, Great Lakes filed a three-count complaint in federal district court seeking exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. § 181, *et seq.* and, additionally, indemnity and contribution from the City for all losses and damages occasioned and incurred from the breach of the tunnel. The complaint alleged admiralty jurisdiction pursuant to 28 U.S.C. § 1333 and the Admiralty Extension Act, 46 U.S.C. § 740. Upon the filing of its complaint, Great Lakes received a stay from the district court against all actions filed against it arising out of the tunnel disaster.

Grubart, a claimant in the limitation proceeding, moved with the City to dismiss Great Lakes' admiralty complaint. The district court dismissed the complaint, holding that it did not have subject matter jurisdiction and that Great Lakes' complaint failed to state a claim upon which relief could be granted. This dismissal was reversed by the United States Court of Appeals for the Seventh Circuit, but its mandate to the district court has not issued because of the granting of Grubart's motion for a stay of the mandate.

SUMMARY OF ARGUMENT

The Court of Appeals erred in asserting maritime jurisdiction over thoroughly nonmaritime activities and injuries. *Sisson v. Ruby*, 497 U.S. 358 (1990), recognized that if the relevant entities and instrumentalities were not all engaged in the same types of activity, further refinement of the admiralty jurisdiction test might be required. This case presents such a situation. Here, Great Lakes performed maintenance work relating to a bridge using a mobile, land-type crane sitting atop a stationary barge affixed to the river bottom near the river's edge. This work damaged an underground tunnel system located far under the riverbed and, along with the City of Chicago's inaction in repairing the tunnel, six months later caused massive property damage and economic loss many blocks inland to thousands of downtown businesses such as Grubart's shoe stores.

Neither the situs nor the nexus requirements of this Court are satisfied by these facts. The Seventh Circuit found that Great Lakes' work "related" to traditional maritime activity and that the requisite impact on maritime commerce was provided by a closing of the river, an after-the-fact event clearly attributable to a post-accident, discretionary decision related solely to tunnel repairs. The court's misapprehension of the *Sisson* "activity" and "incident" inquiries resulted in a finding of admiralty jurisdiction without any federal interest having been identified. The court's assumption of a federal interest would have been readily dispelled by consideration of the broader relevant circumstances.

The Seventh Circuit's pedantic analysis of the three *Sisson* questions effectively makes every activity involving a vessel on navigable waters a traditional maritime activity sufficient to invoke maritime jurisdiction without regard to the activities of the other relevant entities. The Court of

Appeals dismissed the importance of the differing activities of the parties by summarily applying the Admiralty Extension Act; this approach bootstrapped the nexus requirement. But *Sisson* suggests that the jurisdictional nexus perspective must be expanded to address the concerns and interests of all the parties before one concludes that a federal interest is involved and that it is best served by invoking maritime jurisdiction. In fact, this approach is followed by the other courts of appeals which have considered the question. Here, the district court which considered all the relevant circumstances, concluded that such a federal interest was absent when "land-based injuries [are] caused by land-based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform." (Pet. App. 39-40). The Seventh Circuit might also have agreed had it not interpreted *Sisson* to preclude an independent policy analysis in the jurisdictional inquiry.

Sisson admonishes that "the demand for tidy rules" must not divorce "the jurisdictional inquiry from the purposes that support the exercise of jurisdiction." 497 U.S. at 364 n.2. The underlying policies supporting the grant of admiralty jurisdiction are furthered by rejecting those situations, such as this one, that lack the flavor of maritime law and advance no federal interest. Admiralty jurisdiction is a reasoned category of substantive concerns, not an arbitrary division of state and national power. In determining the scope of admiralty jurisdiction, weight should be given to a judgment that will relieve the federal courts of the burden of cases essentially irrelevant to their constitutional and statutory missions.

ARGUMENT

I.

THERE IS NO ADMIRALTY AND MARITIME JURISDICTION UNDER 28 U.S.C. § 1333 AFTER CONSIDERATION OF ALL THE RELEVANT CIRCUMSTANCES.

A. The *Sisson* Nexus Test Should Not Be Mechanically Applied.

The Seventh Circuit found admiralty jurisdiction by erroneously applying the three-prong admiralty jurisdiction test of this Court in *Sisson v. Ruby*, 497 U.S. 358 (1990). *Sisson* was the last of a trilogy of Supreme Court cases discussing the "nexus" requirement for admiralty jurisdiction. A nexus requirement was first established by this Court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). In *Executive Jet*, a commercial aircraft crashed into navigable waters just after taking off from Cleveland's airport. The *Executive Jet* Court eliminated the so-called strict "locality" or "situs" test as the determinative factor in applying federal admiralty jurisdiction and added a "nexus" component—that the wrong must bear a significant relationship to traditional maritime activity. After applying the new test to the facts before it, the Court held that there was no admiralty jurisdiction arising out of the crash of an airplane into navigable waters. 409 U.S. at 274. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), the Court extended *Executive Jet's* two-pronged test to a non-aviation situation. In *Foremost*, the Court found that a traditional maritime activity was implicated from the collision of two pleasure vessels on navigable waters because such a collision represented a potential hazard to maritime commerce. 457 U.S. at 677. The nexus component was most recently refined in *Sisson*. *Sisson* involved a fire in a washer/dryer unit in a moored yacht at a marina. The fire damaged nearby vessels and the marina itself. Again, non-commercial vessels were involved but unlike in *Foremost*,

the vessels were not engaged in actual navigation. The *Sisson* Court determined that the storage and maintenance of a vessel at a marina on navigable waters was a traditional maritime activity and judged the incident, the vessel fire, to be a "potential hazard" to maritime commerce. 497 U.S. at 360-367. The Court further refined the nexus part of the test by adding that: (1) the incident giving rise to the claim must have the potential to disrupt maritime commerce; and (2) the activity giving rise to the incident must have a substantial relationship to maritime activity. 497 U.S. at 362-364. The factual configuration in the instant matter—the parties being engaged in different activities—was not before the Court in *Sisson* or any of its predecessors, a fact *Sisson* explicitly noted could require further refinement of the jurisdictional test. 497 U.S. at 365-366 nn.3-4.

The Seventh Circuit's interpretation of the admiralty jurisdiction test differed from that of the district court which engaged in a policy analysis and examined the totality of the circumstances, including the function and role of the injured parties and the nature of the injuries. Although Grubart, as with other injured parties, was not engaged in the same activity as Great Lakes, the Seventh Circuit rhetorically asked the three *Sisson* questions only as they related to Great Lakes: (1) Did the alleged wrong occur on navigable waters of the United States? (2) Did it pose a potential hazard to maritime commerce? (3) Was it substantially related to traditional maritime commerce? *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 228 (7th Cir. 1993). In restricting the inquiry to Great Lakes, the Court of Appeals explicitly rejected a totality of the circumstances approach like that used in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1974), *cert. denied*, 416 U.S. 969 (1974), and since adopted by many of the other courts of appeals which have extended the examination to all of

the relevant parties.[1] *See, e.g., Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602 (3d Cir. 1991); *Price v. Price*, 929 F.2d 131, 135-136 (4th Cir. 1991) (analysis of four factors tempered by traditional concern of admiralty law for torts arising out of navigational errors); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 885 (5th Cir. 1993), *cert. denied*, 127 L. Ed. 2d 654 (1994); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437, 440 (5th Cir. 1991); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1263 (9th Cir. 1993) (four-factor test valid except that causation aspect dropped in view of *Sisson*); *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312, 315 (9th Cir. 1993); *Penton v. Pompano Construction Co., Inc.*, 976 F.2d 636, 640-642 (11th Cir. 1992); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533, 1538-1539 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992).

In contrast, the district court considered the role and functions of all the parties in a combined *Kelly-Sisson* analysis to find that "[t]here are no traditional maritime concerns present here. . . ." (Pet. App. 40). It based its conclusion on the following findings and undisputed facts:

1. None of the vessels [was] directly involved in the cause of the injury to the tunnel wall and did not strike anything to cause the harm in question.

2. The vessels were acting as fixed platforms and were not involved in navigation on a waterway during the pile driving activities.

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[1] The Seventh Circuit also rejected the *Kelly* test when the *Sisson* case was before it. It did not find the test "helpful in developing the kind of analysis indicated by *Executive Jet* and *Foremost*." *See In re Complaint of Sisson*, 867 F.2d 341, 345 n.2 (7th Cir. 1989), *rev'd*, *Sisson v. Ruby*, 497 U.S. 358 (1990). It now suggests that such an inquiry is inappropriate after *Sisson*. 3 F.3d at 228.

3. The injuries were not sustained on a dock or pier next to the site of the work activity, but were experienced on land, blocks away in Chicago's business district.

4. Pile driving is a common construction activity and is found in both maritime and non-maritime settings. The principal purpose of the placement of the dolphins [pile clusters] at the Kinzie Street site was the protection of the bridge, which the Supreme Court views as an extension of land.

5. The pile driving activity did not present a foreseeable or material disruption of maritime commerce on the Chicago River. The actual effect on commerce took place many months after the alleged wrongful acts and were part of the massive remediation efforts engaged in by the City and others.

6. There are no allegations of personal injury on a vessel on navigable waters, nor for damage done to a vessel in navigation or its cargo.

(Pet. App. 38-39).

In view of this factual background, the United States Court of Appeals for the Seventh Circuit erred, as a matter of law, in finding admiralty jurisdiction. The Seventh Circuit did not fairly apply the *Sisson* test because, among other reasons, that test does not require courts to ignore the totality of the circumstances in determining admiralty jurisdiction. The factual situations presented by *Sisson*, *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), involved parties engaging in a similar activity, and thus did not require inquiry into all of the factors comprising the totality of the circumstances tests:

> In this case, all of the instrumentalities involved in the incident were engaged in a similar activity. . . . The facts of *Executive Jet* and *Foremost* also reveal that all the relevant entities were engaged in a common form of activity. See *Executive Jet* . . . (entities involved in the incident were engaged in nonmaritime activity of facilitating air travel); *Foremost* . . . (entities were both engaged in navigation).

Sisson, 497 U.S. at 365 n.3. The *Sisson* test was developed against the backdrop of common activities among the relevant entities and does not, on its face, address how the analysis is to be modified when the entities are engaged in different activities. *Sisson* does suggest that such refinement is necessary (497 U.S. at 365-366 nn.3-4) and, certainly, the principles discussed therein invite consideration of other criteria such as the *Kelly* factors when the circumstances dictate. The Seventh Circuit disdained this analytical flexibility. It made Great Lakes and its barge the *only* relevant entity and instrumentality in this matter and the beginning and end of its entire jurisdictional examination. Along the way, it summarily rejected consideration of *Kelly*-like factors and suggested that such an approach did not survive after *Sisson*. This is a clear conflict with the other courts of appeals which continue to use the *Kelly* test after *Sisson*.

The federal interest in the protection of maritime commerce is the driving force behind this Court's jurisdictional examination. Significantly, the naked nexus formulation developed from *Executive Jet* (but without interjection of *Kelly*-type guidelines) works best when it is least needed—in those situations where the tort claim has a traditional or

strong "maritime" flavor and for which the strict locality test would have been satisfactory:[2]

> It should be stressed that the important cases in admiralty are *not* the borderline cases on jurisdiction; these may exercise a perverse fascination in the occasion they afford for elaborate casuistry, but the main business of the [admiralty] court involves claims for cargo damage, collision, seamen's injuries and the like—all well and comfortably within the circle, and far from the penumbra. G. Gilmore & C. Black, *The Law of Admiralty*, 24 n. 88 (1957).

Executive Jet, 409 U.S. at 254. The courts utilizing the *Sisson* formula without explicitly relying, at least in part, on a *Kelly*-type analysis are in two categories: those with an activity before them falling "comfortably within the circle" (*see, e.g., Price v. Price*, 929 F.2d 131, 136 (4th Cir. 1991) ("core activity" giving rise to injuries derived from navigational errors, a traditional admiralty concern noted in *Foremost*); *Kelly v. United States*, 531 F.2d 1144, 1147-1148 (2d Cir. 1976) (admiralty jurisdiction proper for claim arising from U.S. Coast Guard rescue operation because agency's purpose intertwined with maritime activity); *Western*

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[2] Justice Scalia envisioned as much in his *Sisson* concurring opinion:

> The Court's statement that "the formula initially suggested by *Executive Jet* and more fully refined in *Foremost* and in this case provides appropriate and sufficient guidance," . . . is neither an accurate description of the past nor a plausible prediction for the future.

497 U.S. at 371 n.2. Grubart respectfully states that it does not find Justice Scalia's alternative test to provide the better solution. The better test is one which is both practical and flexible for the myriad of situations likely to arise in the future, such as the totality of the circumstances approach.

Transport Co. v. Pac-Mar Service, Inc., 547 F.2d 97 (9th Cir. 1976) (sinking of work barge involves a traditional maritime activity, *citing Executive Jet*)); and the Seventh Circuit in this matter, willing to apply the *Sisson* nexus test mechanically without articulating a federal interest.

The *Sisson* test by itself is certainly capable of implicating such an interest when the wrong and the general activity are related to a traditional maritime activity. But, as is apparent from the opinions of the courts of appeals which continue to use a totality of the circumstances test, the scope of the examination needed to resolve the *Sisson* nexus test is not always clear cut. For example, the scrutiny called for by an incident arising out of the negligent navigation of a commercial vessel may not be identical to that required for the same incident when it is caused by the action of a stationary barge which was found to have been a vessel. To suggest otherwise is to make the existence of a vessel on navigable waters *the* controlling criteria for maritime jurisdiction. This Court explicitly rejected such a test. *Sisson*, 497 U.S. at 364 n.2. Therefore, even before one adds the complication of different types of activity among the relevant entities to the picture, it is not inconsistent for a *Sisson* examination to make use of all or part of the *Kelly* criteria.

The core of the admiralty jurisdictional inquiry is centered on the search for a federal interest in the protection of maritime commerce. Consequently, one should not have to wonder, as the Seventh Circuit did, whether a policy examination would have produced a result different from that obtained by the operative jurisdiction test. *See* 3 F.3d at 228 (use of a "[s]imilar policy analysis would likely have yielded a different result in *Sisson* itself"). Indeed, there should be a presumption that the Seventh Circuit's reasoning is flawed, no matter what jurisdiction test it used,

simply from the court's suggestion that its holding might differ had a policy analysis been included.

The *Sisson* test is only as good as the assumptions on which it is based. Mechanical application of that test in materially different circumstances will not reliably forecast the existence of a federal maritime interest any better than did the strict locality test. A totality of the circumstances examination would have forced the Seventh Circuit to confront the larger question whether a federal interest was implicated because that is one question which must be asked under such an approach. Moreover, review of the totality of the circumstances would have acted as a check on the Seventh Circuit's erroneous conclusion that the nexus prong was satisfied under the *Sisson* test, a result achieved solely by the court's mischaracterization of the "incident" and the "activity" under the *Sisson* nexus formulation. Significantly, the Seventh Circuit did not question the accuracy of the district court's analysis and holding under the totality of the circumstances test, only that it was the wrong test to use. The opposite results obtained under the two formulae indicate there is a fundamental flaw with one of them when applied to a fact situation of the type now before the Court. This Court's opinions show the flaw to be in the unquestioned application of the *Sisson* test.

B. The Differing Activities Of The Relevant Entities Require That More Than The Two *Sisson* Nexus Questions Be Asked.

After *Sisson*, it is well settled that admiralty jurisdiction demands both a maritime locality (situs) and a relationship to traditional maritime activity (nexus). This dual requirement is a development of the traditional locality test which was once the exclusive consideration. Although the locality test was easy to apply, it led to anomalous results—

admiralty jurisdiction depended simply on whether the wrong occurred on navigable waters or land with little or no regard given to the presence of a traditional maritime activity. *See generally Executive Jet*, 409 U.S. at 253 (1972). The situs test's shortcomings were substantially diminished by the Court's adoption of a nexus requirement.

This new element, the nexus component of the jurisdiction test, was refined in *Sisson* into a two-part inquiry: (1) Did the incident giving rise to the claim have the potential to disrupt maritime commerce? (2) Did the activity giving rise to the incident have a substantial relationship to maritime activity? 497 U.S. at 362-364. The Court stressed that the relevant activity must be defined "not by the particular circumstances of the incident, but by the general conduct from which the incident arose." 497 U.S. at 364. The Court did not provide further criteria for determining how to characterize the activity, but did list the different totality of the circumstances approaches utilized by the courts of appeals to determine whether an activity is substantially related to traditional maritime activity. 497 U.S. at 365-366 n.4. The Court also described the incident in a general manner:

> The jurisdictional inquiry does not turn on . . . the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the [yacht] more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity.

497 U.S. at 363. Three points stand out from the Court's discussion of incident and activity: 1) they are not the same, 2) only the incident is used to assess the impact on

maritime commerce and the specific cause of the incident is irrelevant for jurisdictional purposes, and 3) the two concepts are useful because they relate to the activities and interests of all the relevant entities.

As noted in *Sisson*, after *Executive Jet*, the lower courts developed a number of criteria to evaluate the maritime flavor of a case. The Fifth Circuit took the initiative in *Kelly* and enlisted four factors to aid in establishing the relationship of the wrong to traditional maritime activity:

(1) the functions and roles of the parties,

(2) the types of vehicles and instrumentalities involved,

(3) the causation and the type of injury, and

(4) traditional concepts of the role of admiralty law.

Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1974).[3] The Fifth Circuit later refined this test based on policy guidelines distilled from *Executive Jet* and *Foremost* and added:

(5) the impact of the event on maritime shipping and commerce,

(6) the desirability of a uniform national rule to apply to such matters, and

(7) the need for admiralty "expertise" in the trial and decision of the case.

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[3] After *Sisson*, the circuit courts continued to use all or most of these factors when confronted by situations straddling the margins of admiralty jurisdiction. *See, e.g., Sinclair v. Soniform, Inc.*, 935 F.2d 599 (3d Cir. 1991); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877 (5th Cir. 1993), *cert. denied*, 127 L. Ed. 2d 654 (1994); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992).

Molett v. Penrod Drilling Co., 826 F.2d 1419, 1426 (5th Cir. 1987), *cert. denied*, 493 U.S. 1003 (1989). *See also Oman v. Johns-Manville Corp.*, 764 F.2d 224, 232 (4th Cir. 1985) (discussing same factors), *cert. denied*, 474 U.S. 970 (1985); *Miller v. Griffin-Alexander Drilling Co.*, 873 F.2d 809, 814 (5th Cir. 1989) (there is little difference between the *Kelly* and *Molett* tests); *Shea v. Rev-Lyn Contracting Co.*, 868 F.2d 515, 518 (1st Cir. 1989) (the *Molett* elements are a "more precise enunciation of the examination specified by the fourth factor in the *Kelly* test").

The *Molett* questions relate directly to this Court's oft-stated purpose for establishing maritime jurisdiction—the federal interest in uniformity of law and remedies for all vessel operators in the promotion of maritime commerce. *See Sisson*, 497 U.S. at 367; *Foremost*, 457 U.S. at 677. Both the totality of the circumstances test and the *Sisson* test apply a policy-based analysis. The *Kelly* and *Molett* tests explicitly ask how and why maritime jurisdiction is needed to further this federal interest, whereas the *Sisson* test automatically implicates such an interest if the inquiry represented by the nexus prongs is answered totally in the affirmative. The Seventh Circuit's analysis illustrates the *Sisson* principle while its inequitable holding exemplifies the major shortcoming of the test when applied in a stripped down fashion to situations where the parties are engaged in different types of activity.

C. The Circumstances Here Do Not Implicate A Traditional Maritime Activity Requiring The Application Of Maritime Jurisdiction.

Consideration of the relevant facts of this case results in the overwhelming conclusion that this was primarily a land-based event with, at best, tangential maritime traits

and no significant federal interest to justify supplanting state law with federal admiralty law.

1. ***The Functions and Roles of the Parties***

Great Lakes entered into a general construction and maintenance contract for "bridges and roads" with the City of Chicago. (J.A. 16-30). Great Lakes regularly described this contract as a "maritime contract" in the proceedings below, presumably based on its contention that the pile-driving maintenance work involved had to be performed by marine firms. Despite Great Lakes self-serving characterization, most of the contract reads like any other City of Chicago public works construction contract. It definitely is not a contract to hire a ship or its crew; nor does it fit other traditional categories of maritime contracts. *See generally Kossick v. United Fruit Co.*, 365 U.S. 731, 735-738 (1961) (describing types of maritime contractual obligations).

Before this litigation, the City's stated purpose for entering into the contract was bridge protection. (J.A. 7-15). The City's position has not changed. In contrast, Great Lakes claimed in the state-court class action suit that the purpose of the pilings was bridge protection (Pet. App. 29), but has alleged in this proceeding that the pile clusters also were designed as navigational aids and for the protection of vessels. The Seventh Circuit thought this potential (or incidental) use of the pilings was sufficient and determined that "the installation of dolphins [the pilings] relates to maritime activity." 3 F.3d at 230.

The determinative criteria for the *Sisson* activity requirement cannot depend on Great Lakes' ingenuity in identifying indirect uses for the pilings. Nor should such incidental uses transform Great Lakes' work on the pilings. Even if such uses were present here, "*importance* to mari-

time commerce is not alone sufficient to bring an activity within the scope of admiralty jurisdiction." *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 784 (11th Cir. 1984); *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 644 (5th Cir. 1985). That the work relates to maritime activity is not sufficient for maritime jurisdiction to attach. *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 231 (4th Cir. 1985) (ship repair work performed by landsmen rather than seamen not a uniquely maritime service), *cert. denied*, 474 U.S. 970 (1985).

The district court properly found that the primary purpose of the pilings was the protection of the Kinzie Street bridge. The Seventh Circuit did not dispute or disturb this finding. Under *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908), the pilings were part of the land.

This debate over the primary purpose of the pilings masks the larger issue of whether Great Lakes' activity was inherently maritime in nature. The proper focus for examination of Great Lakes' activity is to be expanded beyond the "particular circumstances of the incident." *See Sisson*, 497 U.S. at 364. In *Sisson*, the storage and maintenance of vessels in a marina was the activity whereas the incident was a fire. *Sisson*, 497 U.S. at 362-363. In *Foremost*, the activity was navigation in general of vessels whereas the incident was the collision of vessels. *Foremost*, 457 U.S. at 675. It follows logically that Great Lakes' general activity was bridge construction or bridge maintenance (from a stationary barge on navigable waters) and the incident was a breach of an underground tunnel.[4]

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[4] The Seventh Circuit defined the incident posing a potential hazard to maritime commerce as "the negligent installation of

(continued...)

The specific task performed by Great Lakes at the time of the alleged tort was pile driving, although Grubart, as with other damaged parties, was injured far inland and long (six months) after Great Lakes engaged in that task. Grubart and the thousands of others similarly situated were neither engaged in a maritime activity at the time of their injury nor injured on or near navigable waters. Both *Sisson* (497 U.S. at 365) and *Foremost* (457 U.S. at 674) suggest that location is important for the nexus test as well as the situs test. The Seventh Circuit invoked the Admiralty Extension Act, 46 U.S.C. § 740, in response to Grubart's argument that it suffered remote land-based injuries and that it was not engaged in a maritime activity (3 F.3d at 229 n.5). That statute, however, extends jurisdiction based only on the *locality* of the injured parties such as to a longshoreman on a dock injured by a vessel appurtenance. *See, e.g., Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963). The Extension Act does not address or resolve the underlying dilemma of how the different activities of the parties affect the jurisdictional nexus inquiry.

2. *The Types of Vehicles and Instrumentalities Involved*

The vehicles and instrumentalities involved in this case were two barges, a tug, a mobile crane placed on the barge, pilings, and an underground freight tunnel. The crane was the type customarily used in land-based construction

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[4] (...continued)
pilings from barges located in the navigable channel" (3 F.3d at 229-230), and the activity as "the sinking of pilings into a riverbed." (*Id.* at 230). There is no material difference between these two events and both are wrong. The Seventh Circuit's confusion underscores the difficulty and arbitrariness possible with a sterile application of the *Sisson* three-prong test in a complicated factual situation.

activity; for this job, it rested on and worked from a stationary barge. (*See* photos at J.A. 64, 68). The barges and the tug were capable of, and allegedly were used for, transporting men and material between the different bridge jobs (and at other times unrelated to this matter) but none of the alleged wrongs can be attributed to these transportation functions. In fact, only one of the barges (the spud scow) was involved in the tunnel breach. It had no independent means of propulsion and was secured to the river floor during the pile driving with its spuds. Its role in this event can succinctly be described as a fixed work platform.

Both the district court and the Court of Appeals felt constrained to define the spud scow as a vessel because the Seventh Circuit had earlier defined a barge as a vessel for Jones Act purposes in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). *But see Sohyde Drill. & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1137 (5th Cir. 1981) (a vessel under the Jones Act is not necessarily a vessel for all other purposes, and the designation is not dispositive for determining whether it had a substantial relationship to maritime activity at the time of the incident), *cert. denied*, 454 U.S. 1081 (1981); *Ellender v. Kiva Constr. & Engineering, Inc.*, 909 F.2d 803, 806 (5th Cir. 1990) (a stationary spud barge used for pile driving was not a vessel under Jones Act); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504, 506-507 (11th Cir. 1990) (stationary spud barge not a vessel in Jones Act matter).

The district court noted that the courts were not consistent on the designation (Pet. App. 36-37), but subordinated the problem of classification to the more pertinent issue of the spud scow's function and role in contributing to the disaster. *Accord, Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533, 1538 (11th Cir. 1991) (involvement of ship is

tangential when it "does not directly affect the character of [sailor's] claims" involving lung condition from occupational exposure to chemicals used in ship maintenance), *cert. denied*, 112 S. Ct. 881 (1992); *Ellender*, 909 F.2d at 808. *See also Sisson*, 497 U.S. at 374 n.5 (Scalia, J., concurring) (the existence of a vessel in navigable water "should not be thought . . . [to] bring within admiralty jurisdiction torts occurring in navigable waters aboard any craft designed to carry people or cargo and to float. . . . The definition is not necessarily static"). It is not disputed that the barge was fixed to the riverbed during the incident and that the disaster cannot be blamed on any kind of navigational error. Moreover, the accident did not damage the barge, and was not attributable to the location of the barge or the crane. In short, the existence of the spud scow in this matter is only tangentially related to the incident and the injuries.

Similarly, there is no maritime connection with the tunnel. It is located approximately 15 feet under the river bed and is logically part of the land. *See National Union Fire Ins. Co. v. United States*, 436 F. Supp. 1078, 1081 (M.D. Tenn. 1977) (under "extension of land" doctrine, structures passing over, into, and beneath navigable waters are treated as part of mainland) (dicta). The tunnel spans approximately 47 *miles* under the City and crosses under navigable waters at only a handful of locations. The breach of the tunnel did not occur on the waters, but under the river bed.

3. *The Causation and Type of Injury*

Any analysis of a tort claim must begin with an assessment of where and how the claim originated and to whom the injury occurred. *Sisson* does not foreclose inquiry into the causation of the injury to Grubart and the other injured parties. *Sisson* does direct that the precise cause of the

injury is immaterial when defining the general character of the activity and incident:

> [T]he relevant "activity" is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose. . . . This focus on the general character of the activity is, indeed, suggested by the nature of the jurisdictional inquiry. Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question. Thus, in this case, we need not ascertain the precise cause of the fire [the incident] to determine what "activity" Sisson was engaged in.

497 U.S. at 364-365. Similarly, whether the tunnel breach turns out to be the proximate result of Great Lakes' misconduct, the City's negligent failure to maintain the tunnel,[5] or a combination thereof, is a question of causation that should not be used to "answer the legally and analytically antecedent jurisdictional question." Yet the Seventh Circuit did just that—it erroneously characterized the incident as the "negligent driving of pilings into the riverbed" (3 F.3d at 229), and further used that action as the basis for its observation that river traffic was actually disrupted (3 F.3d at 230).

The injured parties' role in the jurisdictional inquiry must consist of their connection to the asserted maritime activity. Here, that connection is indisputably the breach of

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[5] Great Lakes' admiralty complaint alleges, *inter alia*, that the City's negligent maintenance of the tunnel is the sole cause of the flood in downtown Chicago. (J.A. 34). Interestingly, the City also admits that "had the breach in the tunnel been repaired [by the City] . . . the plaintiffs would not have been injured at all." City Petition for Certiorari at 17-18.

the underground tunnel with its resultant inundation. Only that event covers all the injuries, includes all the relevant entities and instrumentalities, and does not require inquiry into proximate causation. When the parties are engaged in a different activity, and especially when the injury, as here, occurs on land, a court must expand its jurisdictional focus to include all parties and the nature and character of the injuries. The Seventh Circuit's opinion in *Sisson* suggested as much even while spurning the *Kelly* test:

> Analysis centered on how closely the source of an accident is related to "traditional maritime activity" thus seems an unproductive approach to the problem—at least in the context of accidents involving only vessels in navigable waters (*as opposed to incidents involving objects on shore*).

In re Complaint of Sisson, 867 F.2d 341, 344 (7th Cir. 1989) (emphasis added), *rev'd*, 497 U.S. 358 (1990). If the incident is the breach of the underground tunnel, it had no impact on maritime commerce, actual or potential.[6] The "actual impact" on maritime commerce to which the Seventh Circuit pointed occurred six months after the wrong in connection with a fortuitous choice of repair methods to the tunnel. As noted in *Foremost*, "[n]ot every accident in navigable waters that might disrupt maritime commerce will support admiralty jurisdiction." 457 U.S. at 675 n.5. Repair efforts cannot demonstrate a potential impact on maritime commerce, for otherwise *every* event occurring on navigable waters would have the potential to affect maritime commerce. That would lead us back to the discredited strict locality test.

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[6] On this basis alone, even with its sterile and mechanical application of the *Sisson* test, the Seventh Circuit should have found no admiralty jurisdiction.

The Seventh Circuit committed another error in its analysis of the nexus requirement for an impact on maritime commerce. It defined the incident and the activity as the same (*see* n.4, *supra*) and thereby effectively measured the impact on maritime commerce against the activity rather than the incident. This Court did not rely on the general activity in *Foremost* (navigation) or in *Sisson* (storage and maintenance of vessels in a marina) to assess whether there was an actual or potential effect on maritime commerce. If the conduct is defined in broad, general terms—as the activity invariably is—it *always* will pose a theoretical, potential hazard to maritime commerce. Such a result would negate the need for any further inquiry and create a simple one-part *nexus* test in which a potential adverse effect on maritime commerce can simply be assumed. The Court explicitly rejected a suggestion to dispense with the impact requirement on maritime commerce. *Sisson*, 497 U.S. at 364 n.2.

The *Kelly* test makes the type of injury a relevant consideration in the jurisdictional inquiry. The character of the injury has special importance when nonmaritime activities and land-based parties are involved. Here, there is no discernible relationship between the injuries of Grubart and the thousands of other plaintiffs, and a traditional maritime activity. Grubart's land injury is not of the type expected from a maritime activity. *Compare In re Exxon Valdez*, 767 F. Supp. 1509, 1512 (D. Alaska 1991) (oil spill causes shoreline property damage); *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964) (insecurely moored ship causes bridge and other downriver structural damage), *cert. denied*, 380 U.S. 944 (1965); *Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204 (5th Cir. 1968) (poorly navigated vessel hits bridge), *cert. denied*, 393 U.S. 983 (1968). Moreover, the land-based injuries here were not the result of a maritime function of the instrumentalities involved. *See Victory*

Carriers, Inc. v. Law, 404 U.S. 202, 213-214 (1971) ("typical elements of a maritime cause of action are particularly attenuated" where injuries not caused by vessel's equipment or cargo). In short, this is not a question whether the type of injuries are unique to maritime activity. It is more a matter of finding *any* relation between the injuries sustained and traditional maritime activity. There is none.

4. *Traditional Concepts of the Role of Admiralty Law*

The fourth factor in the *Kelly* test is the most important. *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 231 (4th Cir. 1985); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533, 1538 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992). The policy basis underlying the assertion of federal maritime jurisdiction is the strong federal interest in protecting maritime commerce and the need for a uniform development of laws governing all vessel operators. *Sisson*, 497 U.S. at 367; *Foremost*, 457 U.S. at 674-675, 677; G. Gilmore & C. Black, *The Law of Admiralty*, §§ 1-1, 1-5 (1975). The Seventh Circuit implied that a policy analysis had no independent role in the admiralty jurisdiction test:

> We believe that, following *Sisson*, the jurisdictional inquiry must be more rigidly structured than this. A court may not engage in the sort of policy analysis that apparently informed the district court's decision. Similar policy analysis would likely have yielded a different result in *Sisson* itself.

3 F.3d at 228. The Seventh Circuit's refusal to engage in an explicit policy analysis left the thousands of injured parties without a role in the court's maritime jurisdictional analysis.

When substantial nonmaritime (and land-based) activities and elements are involved, as here, the putative federal

interest served by applying maritime jurisdiction must be weighed against the interests of applying the appropriate state laws. *See, e.g., Foremost*, 457 U.S. at 685 (Powell, J., dissenting) ("federalism concern is the dominating issue in the case"). *See generally* Currie, *Federalism and the Admiralty: The Devil's Own Mess*, 1960 Sup. Ct. Rev. 158 (1960). The federalism concern is adequately addressed by asking the three *Molett* questions and by faithfully adhering to the original narrow policy bases for admiralty jurisdiction discussed in *Executive Jet*, *Foremost*, and *Sisson*. As with any other policy matter, it is helpful to describe, if only by example, the types of traditional concerns of admiralty law which the federal interest presumes to protect. This Court in *Executive Jet* stated:

> Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Executive Jet, 409 U.S. at 270. Other examples abound, none of which remotely relates to the facts of this case: vessel seaworthiness actions and navigational rules (*see, e.g., Western Transport Co. v. Pac-Mar Service, Inc.*, 547 F.2d 97 (9th Cir. 1976) (capsized barge)), and injury to passengers or seamen (*see, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953)).

Foremost raised vessel navigation as a traditional maritime activity and *Sisson* did not abandon that linkage. The activity in *Sisson*—storage and maintenance of vessels in a marina on navigable waters—was deemed an "indispensable" maritime adjunct to navigation:

> At such a marina, vessels are stored for an extended period, docked to obtain fuel or supplies, and moved into and out of navigation. Indeed, most maritime voyages begin and end with the docking of the craft at a marina.

497 U.S. at 367. In contrast, the instant case involves a vessel tangentially at best (if a stationary barge acting as a work platform is a vessel), and the entire notion of navigation is antithetical to the function of the spud scow here. It contributed to the accident, if at all, as a fixed work platform rather than in the traditional maritime roles of navigation, storage and docking, and loading and unloading of cargo.

The Seventh Circuit did not discuss how the national interest would be served by applying admiralty jurisdiction. There are no technical complexities requiring a specialized maritime expertise in order fully to understand the case. This is a traditional tort action arising in negligence, so no uniform law need be applied.[7] In *Foremost*, due deference

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[7] A federal consolidated action arising out of the *same disaster* is presently pending in the United States District Court for the Northern District of Illinois (No. 93 C 1214). In connection with the court's denial of the City's motion to dismiss or stay the federal action on abstention principles, the court had this to say about the issues involved:

> The facts and issues of this consolidated federal action require for their resolution only basic principles of tort law.

In re Chicago Flood Litigation, 819 F. Supp. 762, 764 n.2. (N.D. Ill. 1993).

> Indeed, in the abstention calculus, presence of federal issues favors the exercise of federal jurisdiction. . . . In these cases, however, state law governs. . . . At its core, this litigation represents a traditional tort action.

Id. at 766.

for "uniform rules of conduct" was repeatedly stated in the context of navigation of vessels. Federal maritime interest in uniformity in areas other than navigation does exist (*see, e.g., Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (extending right to recover for wrongful death under general maritime law); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437, 441 (5th Cir. 1991) (discussing need for uniform maritime rules regarding the duty of care owed to all persons on vessels)), but none has been raised in this matter. "The looser a legal doctrine, like that of the duty to observe 'the uniformity of maritime law,' the more incumbent it is upon the judiciary to apply it with well-defined concreteness." *Kossick v. United Fruit Co.*, 365 U.S. 731, 743 (1961) (Frankfurter, J., dissenting). Other substantial state concerns subject to being lost through admiralty jurisdiction range from the City's right to assert tort immunity under the Illinois Local Government and Governmental Employees Tort Immunity Act, 745 ILCS ¶¶ 10/1-101 to 10-101 (1992), to the right of land-based claimants to have their tort actions heard before a jury. *See, e.g., Complaint of Great Lakes Towing Company*, 395 F. Supp. 810, 813 (N.D. Ohio 1974); *Luhr Bros. Inc. v. Gagnard*, 765 F. Supp. 1264, 1267 (W.D. La. 1991). Federal intrusion should require a higher level of certitude when garden variety state tort claims and state interests dominate the litigation. These substantial legitimate state concerns should not be preempted by a nebulous federal interest.

The Seventh Circuit ignored too many competing state interests and nonmaritime indicia in running through the *Sisson* test. "Federal courts should not displace state responsibility and choke the federal judicial docket on the basis of federal concerns that in truth are only 'imaginary.' " *Foremost*, 457 U.S. at 686 (Powell, J., dissenting). The purported federal interest here is only a chimera; its existence has been assumed merely because the Seventh

Circuit found a way to answer the three *Sisson* questions affirmatively. The scope of admiralty jurisdiction should not be expanded so cavalierly into areas of traditional state common law rules of tort and contract. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202, 211-212 (1971). Thousands of parties not remotely engaged in a maritime activity should not be subjected to federal admiralty law for claims requiring no maritime expertise and having no substantial maritime connection.

5. *Summary*

The Seventh Circuit misidentified the activity and incident under *Sisson* to reach its result. Had it properly characterized them, it would not have answered the three *Sisson* questions the way it did and it would not have found admiralty jurisdiction. The Seventh Circuit's approach shows that the *Sisson* test is susceptible to easy manipulation if the inquiry is unbending and limited to asking only three questions.

This Court has been unwilling to hold that maritime commerce embraces everything that happens on water. No federal policies underlying admiralty law are enhanced or fulfilled by its application in this matter, whose facts do not call for the application of substantive maritime legal principles. Some superficial maritime attributes may be present, but their relevance and role should be confined to the reality of the event, not inflated and extended to substantiate an imaginary federal interest. The *Kelly* test, in conjunction with the *Sisson* analysis, provides the proper perspective. The district court made the search for the federal maritime interest the touchstone of its jurisdictional inquiry, and found strong arguments against the exercise of admiralty jurisdiction under each of the *Kelly* factors:

> Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. . . . Traditional common law rules of tort and contract should do quite nicely in the resolution of the material disputes here; the specialization of admiralty rules is not necessary. The totality of the circumstances lead unyieldingly to that conclusion. Simply put, we have land-based injuries caused by land-based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform. The maritime connection of the principal activities is neither direct nor material and supply none of the causation for the alleged injuries.

Pet. App. 39-40.

Viewed as a whole, the circumstances of this case fail to implicate traditional maritime concepts such as seaworthiness, rights of carriage, general average, cargo damage, rights of seamen, salvage, maritime liens, and the other matters concerned with movement of persons and goods in the usual form of maritime commerce. No single factor is dispositive, but consideration of all of the facts reveals no meaningful connection among the principal activities, the injuries, and maritime commerce. Admiralty law has little expertise or interest in the traditional state tort principles which dominate this litigation.

II.

THE JURISDICTIONAL SITUS REQUIREMENT IS NOT SATISFIED BY INVOCATION OF THE ADMIRALTY EXTENSION ACT, 46 U.S.C. § 740.

The Seventh Circuit applied the Extension Act to the jurisdictional situs requirement as mechanically as it

applied the *Sisson* test to the nexus component. Under the locality test, if the tort originates on water but the substance and consummation are on land, there is no admiralty jurisdiction except through the Extension Act. 1 *Benedict on Admiralty* § 172 at 11-33 n.6 (7th ed. 1991) (citing cases); *see also Executive Jet*, 409 U.S. at 255 (*quoting Smith & Son v. Taylor*, 276 U.S. 179, 182 (1928) ("[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land")). The consummation of the tort is where it took effect. *Executive Jet*, 409 U.S. at 266; *The Plymouth*, 70 U.S. (3 Wall) 20, 34-35 (1866); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 782 (11th Cir. 1984). *See also* Sen. Rep. No. 1593, 1948 U.S. Code Cong. & Adm. News, p. 1902.

All of the injuries here occurred on land. One need only read the opening paragraph of the Seventh Circuit's opinion to gain the sense that this "leak" turned into a full scale disaster because of what happened in the downtown business district of Chicago. Similarly, it is the specter of hundreds of millions of dollars in damage claims by Loop businesses that caused Great Lakes to seek asylum by filing a complaint in admiralty. *See generally* class action complaint filed in state court (Record at 44, Tab A).

The legislative history of the Extension Act makes clear that it was designed to address the inequities and anomalies of the then-extant strict locality test.

> Under existing law, admiralty and maritime jurisdiction in respect of claims arising out of maritime torts is extended . . . to only those cases where injury is done upon navigable waters, and not to those where injury is done to persons or property situated upon land, even though the injury is caused by a vessel situated on navigable waters. For example, if a bridge or pier, or any person or property situated thereon, is in-

> jured by a vessel, the admiralty courts do not entertain the claim for the damages thus caused. . . . The bill under consideration would provide for the exercise of admiralty and maritime jurisdiction in all cases for the type above indicated.

Sen. Rep. No. 1593, 1948 U.S. Code Cong. & Adm. News p. 1899. The Extension Act itself, 46 U.S.C. § 740, provides in relevant part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

This case requires application of the Extension Act if the situs requirement is to be satisfied; the tortious conduct originated on navigable waters but the damage was felt on land. However, an underlying prerequisite to implementation of the Act is that the parties injured on land must have been damaged by a vessel or a defective appurtenance of a vessel.[8] *Margin v. Sea-Land Services, Inc.*, 812 F.2d 973, 975 (5th Cir. 1987) (under the Extension Act, "a [party] injured on shore must allege that the injury was caused by a defective appurtenance of a ship on navigable waters"); *Pryor v. American President Lines*, 520 F.2d 974, 982 (4th Cir. 1975) ("For a ship to be responsible for injuries shore-

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[8] **Appurtenance** – **1.** Something added to another, more important thing; an appendage; accessory. **2.** *Plural.* Any equipment, such as clothing, tool, or instruments, used for a specific purpose or task; gear. . . .

The American Heritage Dictionary of the English Language (1973).

ward of the gangplank [under the Act] we think it must proximately cause injury to those ashore"), *cert. denied*, 423 U.S. 1055 (1976). *See also Victory Carriers v. Law*, 404 U.S. 202, 210-211 (the finding of jurisdiction under the Extension Act in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963), "turned, not on the 'function' the stevedore was performing at the time of his injury, but, rather, upon the fact that his injury was caused by an appurtenance of a ship, the defective cargo containers. . . ."). *But see Gutierrez*, 373 U.S. at 209-210 (statute not limited to situations where "physical agency of the vessel or a particular part of it" causes the injury). There is no allegation here that the stationary barge caused the breach of tunnel located many feet under the river bed. At best, it was an arguable appurtenance to that barge, either the crane or the pile driver, that is implicated in the breach. Great Lakes has not alleged that either was defective and for this reason, the Extension Act is not available to extend jurisdiction.

Even if the Extension Act does not require that the physical agency of the vessel or a defective appurtenance must cause the injury, the inland reach of the Extension Act is not infinite. This Court discussed the logical reach of the Extension Act in *Gutierrez*. In that case, admiralty jurisdiction was applied to the claim of a longshoreman who slipped on a dock from spilled beans being unloaded from a ship. This Court held:

> We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 U.S.C. § 740 when, as here, it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and the *impact of which is felt ashore at a time and place not remote from the wrongful act.*

373 U.S. at 210 (emphasis added). *See also Crotwell v. Hockman-Lewis, Ltd.*, 734 F.2d 767, 769 (11th Cir. 1984) ("The cases have not developed any articulable standard by which to determine when an injury is too remote in time and place from traditional maritime activity to satisfy admiralty jurisdiction").

The Seventh Circuit misconstrued the *Gutierrez* holding by finding that the Court's reference to "remoteness" related to proximate cause rather than a limitation on jurisdiction. 3 F.3d at 229. The legislative history of the Extension Act suggests that Congress intended to extend maritime jurisdiction to shoreside damage such as to give an admiralty action to land owners whose property was damaged by a vessel on navigable waters. Illustrative examples abound in the legislative history but they revolve around problems such as bridge and pier damage by a moving vessel, and innocent owners of such land structures sustaining harm caused by a compulsory pilot on board a vessel. *See also, e.g., Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 222 (1969) (the Act provides a remedy for "parties aggrieved by injuries done by ships to bridges, docks, and the like. . . .").

These examples, when read in light of the "vessel" requirement in the Act, suggest a temporal and spatial jurisdictional limitation to the otherwise unending encroachment of maritime jurisdiction inward from the water and shore. The further one gets from navigable waters the weaker the relationship between the injuries and traditional maritime activity. Similarly, the further inland the injuries, the more likely that state and local laws are better suited to govern the asserted legal wrongs and injuries.

III.

THE TEST FOR ADMIRALTY JURISDICTION MUST WEIGH THE PUTATIVE FEDERAL INTEREST AGAINST THE STATE INTERESTS WHEN THE RELEVANT ENTITIES ARE ENGAGED IN DIFFERENT TYPES OF ACTIVITY.

The reasoning of *Sisson* is consistent with the use of the *Kelly* and *Molett* factors. *Sisson's* three-prong test follows logically from consideration of those factors. It is important to avoid a mechanical application of whatever test is used, but that is just what *Sisson* invites if characterizing the activity and incident is divorced from a *Kelly*-type inquiry. This manipulation of "generalities" and "potentialities" can be minimized by requiring *specific* identification of how a federal interest is to be advanced by the application of maritime jurisdiction. It is not enough to claim there is a federal interest in the case—what is the specific policy of uniformity or expertise that requires the application of substantive maritime law in the case? Any federalism issues will implicitly be raised by the fourth *Kelly* factor and the three *Molett* factors.

Alternatively, one can concentrate the *initial* analysis on the entities having a relation to the activity leading to the incident, much like the Seventh Circuit did. But if the relevant entities are engaged in different types of activity, the inquiry must continue. Even if a federal interest is suggested at the end of the first stage, its strength must be balanced against the competing non-admiralty interests and issues. Only by introducing the competing state interests can one determine whether the federal interest is substantial enough to invoke maritime jurisdiction. The strength of the federal maritime interest is not constant and will vary depending on the type of maritime activity identified in the first stage of the inquiry. A federal interest based on vessel navigation or another strong traditional maritime activity,

for instance, may be difficult to overcome by nonmaritime attributes and state interests. The burden of establishing and supporting the existence of a substantial federal interest in the matter should be placed squarely on the party seeking the protections of maritime jurisdiction. In the difficult case, it is invariably that party who seeks to extend the limits of admiralty jurisdiction for its personal benefit, a self-interest that rarely speaks to the national interest in protecting maritime commerce.

CONCLUSION

For all of these reasons, Petitioner, Jerome B. Grubart, Inc., urges the Court to reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

BEN BARNOW
Counsel of Record
ALAN M. GOLDBERG
ALBERT CUELLER
BARNOW AND HEFTY, P.C.
105 W. Madison St., Ste. 2200
Chicago, Illinois 60602
(312) 621-2000

ROBERT A. HOLSTEIN
BRUCE J. GOODHART
ARON D. ROBINSON
HOLSTEIN, MACK & KLEIN
300 S. Wacker Dr., 32nd Fl.
Chicago, Illinois 60606
(312) 906-8000

WILLIAM J. HARTE
WILLIAM J. HARTE, LTD.
111 W. Washington Street
Suite 1100
Chicago, Illinois 60602
(312) 726-5015

PHILIP B. KURLAND
ALAN S. MADANS
ROTHSCHILD, BARRY & MYERS
55 W. Monroe Street
Suite 3900
Chicago, Illinois 60603
(312) 372-2345

Counsel for the Petitioner
Jerome B. Grubart, Inc.

April 22, 1994